In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Case No. 84-1480

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER ON THE MERITS

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QUESTIONS PRESENTED

1. Whether a defendant's post-Miranda warning behavior, including silence, may be used as substantive evidence of his sanity at or near the time of the offense when that defendant elects to present an insanity defense, or whether such use of post-Miranda silence is violative of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

2. Whether the Court of Appeals decision in the instant case which reached this cause on the merits is in conflict with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594 (1977), where Respondent's claim was barred by his failure to comply with Florida's contemporaneous objection rule.

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PREFACE

The following references are made herein:

(JA) for the joint appendix, consisting of JA-1 - 100;

(R) for the record on appeal from the United States District Court to the Eleventh Circuit Court of Appeals;

(SR) for the state court record.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported as Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) (rehearing denied January 28, 1985) and appears in the joint appendix at JA 4 - 37.

The opinion of the District Court of Appeal, Second District of Florida is reported as Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) and appears in the joint appendix at JA 56 - 66. The memorandum opinion of the Florida Supreme Court remanding this cause to the District Court of Appeal is reported as Greenfield v. State, 364 So.2d 885 (Fla. 1978) and appears in the joint appendix at JA 67 - 68.

JURISDICTION

On September 6, 1984, the United States Court of Appeals for the Eleventh

Circuit reversed and remanded an Order of the United States Court for the Middle District of Florida denying a petition for writ of habeas corpus brought by a state prisoner pursuant to 28 U.S.C. §2254. A timely petition for rehearing was summarily denied on January 28, 1985.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a capital Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the Constitution of the United States provides inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 28 U.S.C. §2254(a) provides that:

> The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only

> on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On June 26, 1975, the office of the State Attorney of the Twelfth Judicial Circuit, in and for Sarasota County, Florida filed a direct information against DAVID WAYNE GREENFIELD charging him with sexual battery committed with force likely to cause serious personal injury. Greenfield entered a plea of not guilty on July 11, 1975. This plea was changed to not guilty by reason of insanity on August 15, 1975. A Statement of Particulars in support of the insanity defense was filed October 9, 1975.

A trial by jury was held on two days, October 14, and 15, 1975. At trial, Greenfield pursued his insanity defense,

but did not concede that he had committed the offense charged. (SR 16, 17). At trial, the victim, Tiana Parr, testified that she reported the assault upon her immediately. (SR 41) Officer Russell Pilifant testified that he was at the police station when the victim reported the crime, and that he then went out to the beach where the crime occurred and came into contact with Greenfield. (SR 72 - 74) During direct examination, Officer Pilifant testified that he read Greenfield the Miranda rights (SR 77); and that Greenfield refused to talk with him before consulting an attorney. (SR 77 - 78) (JA 72 - 76) Officer Gordon Jolley offered similar testimony regarding Greenfield's decision to remain silent. (SR 96 - 98) (JA 77 - 79).

The defense registered no objection to this testimony. In closing arguments, the prosecutor made reference to the testimony of Officer Pilifant summarized in the following manner:

> "Let's go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'what's going on?' No. he says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down -- as going down the car as you recollect Officer Pilifant

said he explained what Miranda rights meant and the guy said - and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley - he's down there. He says, 'have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk.' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant --" (SR 338 - 339) (JA 96 - 97)

Greenfield tendered an objection to this line of argument but Greenfield did not tender a Motion to Strike or a Motion for Mistrial. Similarly, Greenfield did not request curative instructions. (SR 339)

A verdict of guilty as charged was returned and, in an order filed November 21, 1975, Greenfield was adjudicated guilty and sentenced to life imprisonment.

Notice of Appeal was timely filed on November 21, 1975. By an opinion filed September 24, 1976, the District Court of Appeal, Second District, affirmed the judgment and sentence of the trial court. A petition for rehearing was filed on October 6, 1976, and denied October 25, 1976. Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) (JA 56 - 66) At this point, a Petition for Writ of Certiorari was filed in the Florida Supreme Court.

By an order filed March 7, 1977, the Florida Supreme Court granted Greenfield's Petition for Writ of Certiorari and jurisdiction transferred to the Florida Supreme Court. That Court then remanded the case to the District Court of Appeal, Second District for proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978). (JA 67 - 68)

After such proceedings, the Second District Court of Appeal entered an order ruling that its initial opinion in Greenfield was consistent with Clark v. State, supra. and reaffirmed its original opinion. (JA 69 - 70)

Greenfield next sought federal habeas corpus relief claiming a violation of his Fifth Amendment rights by the prosecutor's reference to and use of Greenfield's post-arrest silence during trial and final argument. The federal district court denied relief (JA 47 - 55) and Greenfield appealed to the Eleventh Circuit. The Eleventh Circuit reversed, holding that post-arrest silence could not be utilized to rebut an insanity defense. (JA 4 - 37)

SUMMARY OF THE ARGUMENT

I.

When a defendant elects to present an insanity defense, the critical question is the criminal responsibility of the accused at the time he committed the offense, not whether the accused is, in fact, the perpetrator of the crimes charged. Sanity, or lack thereof, is a nebulous issue. The interests of justice are best served when the trier of fact has access to all evidence reasonably bearing on the demeanor of the accused at or near the time of the offense. Under these circumstances, the use of a defendant's post-Miranda[1] warning behavior, including silence does not violate Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

(1976). The Eleventh Circuit's holding to the contrary in the case at bar represents an unwarranted extension of Doyle.

The police officers at bar properly advised respondent of his rights under Miranda. Admission of testimony concerning respondent's behavior and argument thereon did not infringe on respondent's right to be free from self incrimination, but instead provided probative evidence on the issue which respondent elected to inject into the case - his sanity.

II.

It is undisputed that respondent never objected to the testimony of Officers Pilifant and Jolley. The Court of Appeals has held that this failure to object can be excused by Greenfield's subsequent objection to the prosecutor's closing argument flies in the face of

Florida's contemporaneous objection rule and clearly violates this Court's ruling in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

ARGUMENT

QUESTION I

Whether a defendant's post-Miranda warning behavior, including silence, may be used as substantive evidence of his sanity at or near the time of the offense when that defendant elects to present an insanity defense, or whether such use of post-Miranda silence is violative of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

In the case at bar, the Court of Appeals relied on this Court's opinion in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and held that the use of respondent's post-Miranda warning conduct, including his silence, as proof of sanity entitled him to a new trial.[2] In Doyle, this Court ruled

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[2] The Court of Appeals specifically held that the harmless error doctrine espoused in Chapman v. California, 368 US. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) did not apply because the prosecutor relied heavily on Greenfield's conduct as evidence of sanity. While petitioner does not necessarily agree with the Eleventh Circuit's conclusion in this regard, petitioner does not challenge that ruling here.

that a defendant's post-Miranda silence may not be used to impeach later exculpatory testimony given by the defendant. Id. Petitioner does not challenge the holding in Doyle, but submits that the Eleventh Circuit has improperly extended Doyle beyond the facts of that case.

Prior to trial, respondent entered pleas of not guilty and not guilty by reason of insanity. (SR 3, 4) At trial, the fact of respondent's commission of the offense charged was never seriously

contested.[3] The jury's attention was instead focused on whether respondent knew right from wrong at the time he sexually assaulted the victim. Officers Pilifant and Jolley testified without objection that at the time of his arrest, about two hours after the offense occurred (SR 47, 92), respondent appeared "normal" that is, he was calm, polite, able to follow instructions, and understand his rights when they were explained to him. (JA 71 - 81) Respondent, by the same token, was not ranting, raving, incoherent or obviously confused or unbalanced. This evidence, while not conclusive proof of sanity, was certainly relevant.

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3 In fact, defense counsel confined his closing argument to two factors, whether respondent had utilized force likely to cause serious personal injury and whether respondent was sane when he committed the offense. (SR 341 - 354)

Use of such evidence to prove sanity does not violate Miranda by compelling a defendant to incriminate himself or punish him for assertion of a constitutional right as proscribed by Doyle. Both the Seventh and the Tenth Circuits have held that Doyle is inapposite in the context of an insanity defense. Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. den., 460 U.S. 1043, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983); United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978). In Sulie, the Seventh Circuit approved the use of the defendant's post-Miranda request for an attorney to establish sanity, and held:

> Against the slight inhibiting effect on the constitutional right of silence of permitting testimony that a criminal defendant requested counsel at his

> interrogation, we must weigh the value to the state of being able to show that, when interrogated soon after the crime, the defendant who now claims he was insane when he committed the crime was sufficiently lucid to ask for a lawyer.
>
> Id. at 130

See also Jacks v. Ducksworth, 651 F.2d 480 (7th Cir. 1981); Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), cert. denied, 383 U.S. 951 (1966).

Last term, in New York v. Quarles, __ U.S. __, 104 S.Ct. __, 81 L.Ed.2d 550 (1984), this Court, in setting forth a limited public safety exception to the requirements of Miranda, permitted the use of a defendant's response to pre-Miranda custodial interrogation and evidence derived therefrom. The Court reasoned that it was incumbent on the officers involved to locate the weapon involved as quickly

as possible and refused to penalize the state for good police work by excluding the evidence at trial. Id. at 81 L.Ed.2d 557 - 558.

Likewise to preclude the evidence of the police officers at bar is to penalize the state for following proper procedures and promptly advising respondent of his rights. Had Miranda not been administered, the evidence regarding respondent's desire for an attorney and decision to remain silent would clearly be admissible. Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). Had Miranda not been administered and had respondent chosen to make a statement, that statement would have been available to the state for impeachment purposes. Cf. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). If the Court of Appeals

decision in the instant case is allowed to stand, the trier of fact will, on retrial, be denied relevant evidence of respondent's mental state about the time of the offense because the police complied with their obligation to administer the Miranda warnings.

Petitioner submits that Miranda and by extension, Doyle, were never intended to apply where the question of the accused's commission of the crime charged was not in issue. The principle espoused in Harris v. New York, supra and United States v. Havens, 446 U.S. 620, 626, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980) applies with equal force to evidence which the state seeks to use generally to rebut an affirmative defense. Refusal to exclude such evidence leaves wholly intact the state's obligation to prove the defendant's guilt in its case-in-chief without

relying on unlawfully obtained evidence or violating a defendant's right to remain silent. Once, however, a defendant affirmatively presents evidence (or a defense), there is no rational basis upon which to deny the trier of fact probative reliable evidence on the issue of guilt, or, at bar, on the continuing viability of respondent's affirmative defense. There is even less justification to suppress evidence relevant to the defense of insanity. Insanity presupposes that the accused has "committed all the elements of a prescribed offense," United States v. Scott, 437 U.S. 82, 97 - 98, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). Consequently, courts have recognized the similarity between using illegally obtained evidence for the narrow purpose of impeachment and using it only as bearing upon the insanity defense in that it was asserted to be evidence of

rationality contemporaneous to the crime. See Barkley v. United States, 323 F.2d 804, 806 (D.C. Cir. 1963). As observed in Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), there is a need when balancing the interests involved, (to) "weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce . . . " Id. at 417 U.S. 450.

Implicit in a careful scrutiny of Doyle and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) is the fact that the right protected by these cases is a defendant's right to preclude the trial jury from inferring his guilt of a substantive offense based on evidence of post-Miranda silence. See also Anderson v. Charles, 447 U.S. 404,

100 S.Ct. 2180, 65 L.Ed.2d 222 (1980). This inference, of guilt by silence, does not logically or reasonably apply to the issue of mental competency.

Petitioner does not suggest that because respondent was sufficiently lucid at the time of his arrest to request an attorney conclusively establishes his sanity, but rather argues that it is one fact which, taken in connection with the rest of respondent's behavior contemporaneous to the offense, could properly be evaluated by the jury. At petitioner's trial one of the psychiatrists called by the defense, Dr. Lose, testified that respondent was schizophrenic. Dr. Lose testified that respondent's condition could be observed in his conversational style and specifically in his conflicting statements to the victim: I don't know why I did this/I know why I did this. (SR 132)

Surely it was useful and relevant for the jury to be able to evaluate the testimony concerning respondent's behavior in light of the psychiatric testimony adduced. The accuracy of the fact finding process was enhanced by the officers' testimony at the expense of no constitutionally protected right. Cf. Michigan v. Tucker, supra. Unlike the Court of Appeals at bar, this Court has not chosen to extend the holdings of Doyle and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). In Fletcher v. Weir, supra, this Court declined to hold that the use of post-arrest, preMiranda silence against a defendant was constitutionally impermissible. Nor is use of pre-arrest, pre-Miranda silence improper. Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

In South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), this Court held that the use of a defendant's refusal to take a blood-alcohol test against him at trial did not offend the right against self-incrimination. In short, the Eleventh Circuit's extension of the Doyle holding in the case at bar is not supported by the opinions of this Court.

This Court should hold that when, as in this case, the issue is not whether the defendant has committed each and every element of the offense charged, but the complex and elusive subject of his mental responsibility, the jury should be given such evidence bearing upon that defendant's cognition, volition and capacity.

QUESTION II

> Whether the Court of Appeals decision in the instant case which reached this cause on the merits is in conflict with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594 (1977), where Respondent's claim was barred by his failure to comply with Florida's contemporaneous objection rule.

It is beyond dispute that respondent never contemporaneously objected to the testimony of Officers Jolley and Pilifant regarding respondent's post-Miranda conduct. It is only when the prosecutor argued this evidence to the jury that defense counsel saw fit to object -- once. (SR 339) The Court of Appeals has stated, in its opinion in this cause:

> Under these circumstances the Petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the

> evidence's admissibility because he later made 20 objections to the prosecutor's attempt to argue the evidence to the jury. Greenfield v. Wainwright, 741 F.2d 329, 331 (11th Cir. 1984), footnote 1.

The record reflects that defense counsel made only one, not twenty, objections to the prosecutor's closing argument. (SR 339) That argument was nothing more than fair comment on the testimony of Officers Jolley and Pilifant which had come in without objection.[4] Petitioner must argue that the Eleventh Circuit was simply wrong in holding that the Wainwright v. Sykes[5] bar may be avoided by one or twenty subsequent, untimely objections.

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[4] Ordinarily, in closing argument, a Florida prosecutor may properly comment on all evidence adduced during the trial.

[5] Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594 (1977).

It is clear, as a matter of Florida law that if a defendant, at the time an improper comment is made, does not move for mistrial, he cannot, after trial, in the event he is convicted, expect a reversal on appeal. A defendant will not be allowed to await the outcome of the trial with the expectation that if he is found guilty, his conviction will be automatically reversed. Clark v. State, 363 So.2d 331 (Fla. 1978).

The failure of a litigant to raise a claim at trial or on direct appeal in accordance with the procedural requirements imposed by the state will preclude consideration of that claim by the federal district courts in a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254. Wainwright v. Sykes, supra; Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558,

71 L.Ed.2d 783 reh. denied, 73 L.Ed.2d 1296 (1982). This is true whether the default occurred at trial and/or appeal and extends to constitutional as well as non-constitutional claims. Engle v. Isaac, supra.[6]

Petitioner has consistently argued that the Second District Court of Appeal addressed the merits of respondent's claim only in the alternative, after first noting respondent's failure to object to the testimony of Officers Pilifant and Jolley. See Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976). On remand the district court reaffirmed its original opinion and held that it was consistent with Clark v.

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6 The Eleventh Circuit has recognized Florida's contemporaneous objection rule, although choosing to ignore it in this instance. See e.g. Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983).

State, supra. Since Clark expounds the contemporaneous objection rule under discussion it is not reasonable to assume that the Second District Court of Appeal would find its decision consistent with Clark unless it had, in fact, considered respondent's claim not properly preserved for appellate review.

Admittedly, the United States Magistrate, in his report and recommendation held that the Wainwright v. Sykes bar did not apply because the Florida courts reached the merits of the claim. (JA 53) The Wainwright v. Sykes bar was not argued before the Eleventh Circuit. That Court chose to treat the issue anyway, reaching its holding that an untimely objection is sufficient. Petitioner challenged this holding on rehearing. (JA 38 - 44) Thus, unlike the Sykes claim in Jenkins v.

Anderson, supra at 65 L.Ed.2d 92, this issue is properly before the Court.

Although Clark v. State, supra was not decided until after petitioner's trial, petitioner's counsel should have been aware that a timely objection was required and that the testimony in question was, at least arguably, objectionable. Cf. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970); Bennett v. State, 316 So.2d 41 (Fla. 1975). There has never been a finding of cause and prejudice for the failure to properly object, nor would such a finding have been appropriate. Engle v. Issac, supra.

Petitioner would urge this Court to reaffirm the continuing vitality of Wainwright v. Sykes and Engle v. Isaac by holding that respondent's failure to comply with Florida's contemporaneous

objection rule precludes federal habeas corpus review of respondent's claim that his silence was impermissably used against him.

CONCLUSION

Based on the foregoing arguments, Petitioner asks this Court to hold that a defendant's post-Miranda conduct, including silence, may be admitted at trial when sanity is in issue and when the behavior is sufficiently contemporaneous in time to the offense charged as to be relevant evidence of the defendant's mental state at the time of the offense.

Additionally, Petitioner asks this Court to hold that since the Florida courts enforced Florida's contemporaneous objection rule in this case, respondent's petition for habeas corpus was subject to dismissal under Wainwright v. Sykes, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ann Garrison Paschall, Counsel for Petitioner, and a member of the Bar of this Court, hereby certify that on the 21st day of June, 1985, I served three copies of the Petitioner's Brief on the Merits on James D. Whittemore, Esq., Counsel for Respondent, One Tampa City Center, Suite 2470, Tampa, Florida 33602, by depositing with the United States Postal Service a duly addressed envelope with postage prepaid. All parties required to be served have been served.

Ann Garrison Paschall
OF COUNSEL FOR PETITIONER